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published in

Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung
2020

DOI (link to publisher)

[10.1515/zrgr-2020-0006](https://doi.org/10.1515/zrgr-2020-0006)

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Hallebeek, J. (2020). Teaching Roman law in the 21st century: A note on legal-historical education in the Netherlands. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 137(1), 194-227. [6]. <https://doi.org/10.1515/zrgr-2020-0006>

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VI.

Teaching Roman Law in the 21st Century: A note on legal-historical education in the Netherlands

Von

Jan Hallebeek^{*}

Abstract: Can Roman law still be a useful part of the compulsory curricular programme for legal education in the Netherlands? At the beginning of the nineteenth century Roman law taught the student a further systematization of private law. Later it was seen as an introduction to present-day private law, irrespective of whether it was taught in a pandectistic or a more historical way. For the second half of the twentieth century three divergent approaches could be discerned i.e. a 'pandectistic', a 'neo-humanistic' and a 'legal historical' one. Given this until recently existing state of legal education, various premises can be formulated, which preferably should underlie the teaching of Roman law in the near future, viz. an applicative approach, a connection with legal historical research, the awareness that the civilian tradition is not the only one and that it only started with the glossators, and avoiding anachronisms.

Key Words: Legal education, History of Legal Scholarship, Roman law, Legal History, the Netherlands

I. Introduction: Is there a future for Roman law?

Is there a future for Roman law in Dutch law-schools? For a long period this seemed self-evident. From the time the *Corpus iuris civilis* lost its significance as a source of law¹⁾, and in the wake of the German *Pandektenwissenschaft*, Roman law continued to play an essential role in legal education in the Netherlands²⁾. All law faculties had compulsory and usually extensive

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¹⁾ Wetboek Napoleon ingerigt voor het Koninkrijk Holland (1809) art. 3; Afschaffingswet (1829) art. 1.

²⁾ For the distinction between *Pandektenwissenschaft* and *Pandectism* see A.J.B. Sirks, *War Mühlenbruch ein Pandektist?*, in: H.-P. Haferkamp/T. Repgen (eds.), *Wie pandektistisch war die Pandektistik?* Symposium aus An-

courses in Roman law. Such courses were considered to be of great value for the formation of jurists, both future scholars and practitioners, especially with regard to understanding the system and legal dogmatics of contemporary private law. When, around the turn of the century, Roman law started to be taught in a more neo-humanistic manner, considerable attention was paid to reading and interpreting texts from the Digest. Dealing with case materials made students distinguish between what was and was not legally relevant, thereby discovering the decisive legal principle substantiating the specific reply. Moreover, Roman law developed the student's ability to distinguish between a party's position according to the law of obligations, on the one hand, and that according to the law of property, on the other. This made Roman law a perfect introduction to contemporary private law.

However, some decades ago, all of this was to become no longer obvious. The role of classics in secondary education has changed. The former *Bildungsideal* no longer applies and this may have had its effect in academic education. Subsequent curriculum reforms reduced the role of Roman law considerably. Moreover, the programme for a full academic legal education was reduced from five to four years. Roman law had to give way to new compulsory subjects, such as European law and Moot Court. In addition, first-year students now had to complete time-absorbing courses in (legal) skills, often including skills of an elementary nature that were previously assumed to have been sufficiently developed at secondary school. Furthermore, teaching Roman law was more generally threatened by a societal lack of historical interest, insufficient awareness of western history, a decreasing conviction that Roman law had a formative value, especially for future jurists, and an increasing orientation towards legal practice at the expense of academic training. Furthermore, if Roman law managed to survive as a compulsory course, it was now expected to show the historical development of law, rather than to develop the skills required for handling complicated cases of private law. Finally, a course in Roman law or legal history had to be completed, just like all law courses, within a short period of seven weeks.

Should we fear that soon a new age will dawn, in which the capacity to read and understand Digest texts will have disappeared from Dutch law-schools? After all, if Roman law is no longer properly taught, scholarly expertise is also doomed to disappear; leaving the *Corpus iuris civilis* to a single colleague in the Faculty of Humanities, who, by the nature of his field, will be

lass des 80. Geburtstags von Klaus Luig am 11. September 2015, Tübingen 2017, 185–204, 186.

– in the best case – less proficient in understanding the dogmatic subtleties of the Roman texts and in envisaging the practical implications of their abstract legal notions. This question bothers many a Romanist and legal historian nowadays.

Yet, I think that Roman law or legal history can still be a useful part of the compulsory curricular programme. It is important, however, to establish on which premises the teaching of Roman law should be based. First we must understand the various opinions and persuasions which existed and exist as regards the teaching of Roman law. They constitute the background of our present-day considerations. Subsequently, we must see which purposes can be served by using Roman law in contemporary training of academic jurists, and what this implies for selecting materials, shaping courses and writing textbooks. I restrict myself to the Netherlands with an occasional glimpse at Belgium, but there are manifold parallels elsewhere on the continent or in Scotland³).

II. The teaching of Roman law in the Netherlands from the 19th century onwards

When we look at the teaching of Roman law in the Netherlands from the 19th century onwards, we can distinguish various stages. Before describing these stages, it should be noted that in the 1870s and 1880s of the 19th century, Dutch universities introduced chairs for the history of indigenous law, established after the example of the Germanistic branch of the Historical School. The discipline was termed Oud-Vaderlands recht. While Roman law was confined to the law of the Corpus iuris civilis, Oud-Vaderlands recht focussed on what was considered to be the genuine indigenous law of our regions. Neither scholars of Roman law, nor those of the history of indigenous law, were interested in the Roman-Dutch law of the early modern period. This implied that the study of the Old Authorities of Roman-Dutch law, such as Simon van Leeuwen (1626–1682), Johannes Voet (1647–1713) and Dionysius Godefridus van der Keessel (1738–1816), fell out of the curriculum, where they had had a standing place during the 18th century until the promulgation of the Code of 1809, for example, in courses on the *ius hodiernum*⁴).

³) A complicating factor exists in the fact that the nature of Roman law as taught may deviate from the scholarly research in the field of Roman law. As a consequence, the question how to shape Roman law teaching is often considered a separate, independent question. In theory a Faculty of Law educates scholars, but de facto it has to turn out practitioners, mastering a number of distinct legal skills.

⁴) It may also be noted here, that in the following survey the name of one of the

Initially, Roman law courses offered a pivotal contribution to legal education. This had to do with the way positive private law was taught. The Code civil of 1804 and the Burgerlijk Wetboek of 1838 were characterized by a system and by dogmatics, derived from the law as previously in force in France and the Netherlands and as mapped out in scholarly literature. Customary French law, as systematized by Robert-Joseph Pothier (1699–1772), as well as some French revolutionary achievements (equality of all citizens, contractual freedom and a single and absolute right of ownership), had shaped the structure and institutions of the patrimonial law of the Code civil. The latter, in its turn, together with some alterations derived from Roman-Dutch law (a traditionalistic system of transfer of ownership and some specific private delicts incorporated in the text of the Code during the 1830s) were determinative for the Burgerlijk Wetboek of 1838. Accordingly, as regards their structure and terminology, the Code civil of 1804 and the Burgerlijk Wetboek of 1838 were settled in the tradition of early modern law, as to be found in the customs of Paris, Roman-Dutch law, the *usus modernus pandectarum*, etc. The Dutch professors of positive private law adopted the common practice of the French *École de l'exégèse*. They simply discussed the private law materials according to their order in the Code. This holds good for scholars like Nicolaas Smalenburg (1761–1836) and Hendrik Nienhuis (1790–1862). Their teachings lacked a further reflection, such as in the German Historical School and pandectistic scholarship with their more abstract notions and theories. They made no attempt to introduce into their courses and textbooks further systematic elements or to develop more elaborate private law dogmatics⁵). Dutch civil law lacked a book like the *Handbuch des Französischen Civilrechts* of Karl Salomo Zachariae von Lingenthal (1769–1843). This work made Jacob van Hall (1799–1859), professor of the Municipal University of Amsterdam, speak about ‘the salutary influence, which the elaboration of the French legislation in Germany and by German scholars entails for the scholarship of civil law in general’⁶).

greatest Dutch legal historians of the 20th century, Eduard Maurits Meijers (1880–1954), is missing, since he never taught Roman law or legal history, nor wrote textbooks for these subjects.

⁵) A.J.B. Sirks, *Van Code Napoléon tot NBW*, in: D. Heirbaut/G. Martyn (eds.), *Napoleons nalatenschap, Tweehonderd jaar Burgerlijk Wetboek in België*, Mechelen 2005, 323–336.

⁶) Jacob van Hall in his review of K.S. Zachariae von Lingenthal, *Handbuch des Französischen Civilrechts*, 4th ed. vol. 1: “de weldadige invloed, welke de bearbeiding van de Fransche wetgeving in Deutschland en door Duitsche geleerden, op de

It was the Roman law courses which taught the student a further systematization of private law and made them familiar with a repertory of abstract legal notions, which they could use when discussing the provisions of the Code. The value of Roman law textbooks, as those of Goudsmit and Modderman⁷⁾, both appointed shortly after 1860, lies in this specific function of teaching Roman law: imparting a command of refined and coherent concepts. By focusing on the system, the abstract legal notions and by adopting in their textbooks a ‘General Part’ (*Allgemeiner Teil*), these jurists by all means followed the German *Pandektenwissenschaft*, later called *Pandectism*, at least in their teaching.

In Germany, *Pandectism* was meant to provide the foundations for a future system of law, i.e. for the situation when Germany would be politically unified. It sometimes dealt with entirely outdated, antiquarian concepts because these were of academic interest and part of the newly invented system of private law, built on Roman foundations. At the same time, concepts could be derived also from other traditions, including Natural Law, especially for situations where Roman law was unable to provide what was needed for a future legal order. The voluminous handbooks and textbooks, produced by *pandectistic* jurists, were of a dogmatic nature, including a general theory of law. In the second half of the 19th century these books were mostly based on the *Corpus iuris civilis* itself and not so much on (reconstructed) classical Roman law⁸⁾. Although the Dutch professors of Roman law never intended to use the *Corpus iuris* for creating future private law – Roman law was and remained abolished in the Netherlands and there was a Civil Code – they saw the structures and terminology, developed in Germany, as a useful tool to get a grip on the Code and its provisions as in force.

As stated above, Goudsmit and Modderman can be considered followers of *Pandectism*. In his inaugural address at Leiden University (1859) Joel Emanuel Goudsmit (1813–1882) phrased his famous statement that we should not study Roman law because it is Roman, but because it is law⁹⁾. He emphasized

wetenschap van het Burgerlijk Regt in het algemeen [...]”, see *Bijdragen tot regtsgeleerdheid en wetgeving* 12 (1838) 149–156, 149–150.

⁷⁾ See for Goudsmit and Modderman C.J.H. Jansen, *De wetenschappelijke beoefening van het burgerlijk recht in de lange 19e eeuw* (= *Serie Onderneming en recht* 87), Deventer 2015, 102–105, 121–122, 174–175, 206–207, 324–325.

⁸⁾ The gap between the academic teaching of Roman law and the demands of legal practice was bridged by the compulsory examinations required to be passed by those wishing to practise law.

⁹⁾ J.E. Goudsmit, *Oratio de studio juris romani hac quoque aetate in patria no-*

that those parts of Roman law deserve our attention which were received in our Codes or had appeared to exercise an enduring influence¹⁰). Of a rather pandectistic nature was also Goudsmit's Pandecten-systeem. The first volume was a 'general part' (Algemeen Deel), comparable to the Allgemeiner Teil, with which German pandectistic textbooks usually started. The second volume contained a general doctrine of the law of obligations. The emphasis was on Justinianic law in the sense of taking the text of the Corpus iuris as it is as a starting point, just as the more practice-oriented lawyers always had done. Goudsmit did pay some attention to pre-Justinianic law but rejected textual criticism which would undermine the authority of Justinianic law. Goudsmit's Pandecten-systeem was historical in the sense that it occasionally indicated that pre-Justinianic law was different but a-historical in the sense that it presented general dogmatics with which Justinianic or pre-Justinianic Roman law had never been familiar¹¹). Yet we know that, although his lectures on the Institutes were an introduction to contemporary private law, in his lectures on the Digest Goudsmit dealt with classical law¹²). Moreover, he published scholarly articles on Roman law which were written rather in the wake of Legal Humanism¹³).

In his inaugural address in Groningen (1867) Wiardus Modderman (1838–1882) pronounced upon the purpose of teaching Roman law, which in his opinion consisted primarily in a better understanding of contemporary private law¹⁴). His manual on Roman law was pandectistic as regards its outline and nature, presenting general doctrines, but at the same time it paid attention to pre-Justinianic law¹⁵). For jurists as Goudsmit and Modderman the value of Roman law consisted in the dogmatics which the law of their days was supposed to have derived from Roman law. Private law in force had developed on Roman soil, it was argued. Roman law, which in their eyes was of an excel-

stra excolendo. Leiden 1859, 22: "*Juri Romano opera est danda, non quod Romanum, sed quod jus est.*"

¹⁰) Ibid. 23.

¹¹) J.E. Goudsmit, Pandecten-systeem, I–II, Leiden 1866–1870.

¹²) A.A. de Pinto, Levensbericht J.E. Goudsmit, in: Jaarboek 1882, Amsterdam 1882, 65–97, 67.

¹³) A series 'Opmerkingen, het Romeinsche regt betreffende' (Observations concerning Roman law), published from 1857 until 1869 in the Rechtsgeleerd Magazijn [RM] Themis.

¹⁴) W. Modderman, Het Romeinsche regt en de hedendaagsche regtsgeleerdheid, Groningen 1867.

¹⁵) W. Modderman, Handboek voor het Romeinsche recht I, Groningen 1877. Parts II and III were completed by others and appeared later.

lent quality and lasting value, was indispensable for elucidating present-day law and understanding legal writers. Although in their days the *Corpus iuris* was no longer a source of law, they strongly related it to the law as in force.

From the time scholars of positive private law started to embrace Pandectism, as did, for example, the Groningen professor Gerhardus Diephuis (1817–1892), the teaching of Roman law became less pivotal as a preparation for getting a grip on positive law. Pandectistic notions such as ‘legal act’ (*Rechtsgeschäft* or *rechtshandeling*, cf. art. 1349 of the *Oud Burgerlijk Wetboek* [OBW], ‘contractual capacity’ (*Geschäftsfähigkeit* or *handelingsbekwaamheid*, cf. art. 1349 OBW) or ‘authority to alienate’ (*Verfügungsbefugnis* or *beschikkingsbevoegdheid*, cf. art. 667 OBW) were now incorporated in the French way of teaching private law. Nevertheless, Roman law was still seen as an excellent introduction to the system and the principal rules of present-day private law. This did not change, when by the end of the century the pandectistic way of teaching Roman law had to give way to a more historical one, with more attention for classical law.

Also, this more historical way of handling the *Corpus iuris* was seen as a useful part of legal education. The Austrian legal historian Paul Koschaker (1879–1951) termed it as neo-humanism¹⁶). It had its origin in Germany. The promulgation in 1900 of the German *Bürgerliches Gesetzbuch* [BGB] put an end to the *usus modernus pandectarum*, which had still applied the *Corpus iuris*. Pandectism had achieved its ultimate goal, namely the establishment of a system of private law for a unified Germany, based on Roman concepts. At this time Roman law scholars started to look for new horizons and took on the ideals of Legal Humanism, although still persisting in the legal framework established by the pandectists. They expanded the historical component of their discipline, now seeking to discover the historical truth in a purely academic way and with a strong focus on reconstructing the law of the classical period.

A number of Dutch professors followed to some extent the examples, set by their German colleagues. It has to be noted, however, that the humanist, historical approach to Roman law, as practiced previously by the Dutch Elegant School, was never entirely put aside in the Netherlands. The Leiden professor Smalenburg, mentioned above, published the commentary of Anton Schultingh (1659–1734) on the Digest, although in his lectures on the Code civil of 1811 he referred only to contemporary authors¹⁷). Willem Matthias D’Ablaing

¹⁶) See P. Koschaker, *Europa und das römische Recht*, 41966, 290–311.

¹⁷) At least relying on his *Primae lineae juris civilis Hollandici, in primis secundum codicem Napoleonicum*, Leiden 1820.

(1851–1889), also teaching in Leiden, still stuck to the principles of the *mos gallicus* and explicitly rejected those of the new pandectistic trend¹⁸). The latter also holds good for the Utrecht professor Jean Charles Naber (1858–1950), who taught Roman law from 1885 until 1927¹⁹). Naber opposed the extensive repertory of concepts construed by the pandectists and dealt with the development of law during Roman Antiquity²⁰). Under the influence of the emerging neo-humanistic trend in Germany from 1900 onwards, Dutch textbooks started to focus on the reconstructed law of the classical era, albeit presented according to the order of the Codes of civil law. This we find, for example, in the books of Isaac Henri Hijmans (1869–1937) of the Municipal University of Amsterdam and that of Julius Christiaan van Oven (1881–1963) of Leiden University²¹). Despite their focus on classical law and their historical, neo-humanistic approach, these writers regarded Roman law also as useful for legal education since it had produced the main notions and dogmatics of contemporary law²²). Van Oven greatly compared Roman law with the law in force in his own days. His textbook on Roman law, written during World War II, contained numerous references to provisions in the Dutch Civil Code of 1838.

Characteristic of the neo-humanistic teaching of Roman law was also the use of primary, case-based materials. In Germany, the exegesis of Digest texts according to classical law was introduced as an academic exercise. Such a thing had been promoted already by Friedrich Carl von Savigny (1779–1861), who had focussed on classical law. He greatly idealized this stage of Roman law, since it had been developed within legal scholarship rather than being imposed by official authorities²³). In the pandectistic teaching of Roman law in the Netherlands, there had been little room for interpreting such case-based texts in order to develop more general rules (inductive method). However, from the time the teaching of Roman law was more strongly based on the neo-humanistic approach, discussing Digest texts, after the example of the exegesis in Germany was seen as valuable for future jurists.

¹⁸) C. J. H. Jansen, *Wetenschappelijke beoefening* (n. 7) 173–174.

¹⁹) His biography and bibliography can be found in J. Ch. Naber, *Observationum selectae*, edited by J. E. Spruit, Napoli 1995, xvii–liii.

²⁰) C. J. H. Jansen, *Wetenschappelijke beoefening* (n. 7) 175–176.

²¹) I. H. Hijmans, *Romeinsch zakenrecht*, Zwolle 1917; *idem*, *Romeinsch verbintenissenrecht*, Zwolle 1918; J. C. van Oven, *Leerboek van Romeinsch privaatrecht*, Leiden 1945 (first edition).

²²) C. J. H. Jansen, *Wetenschappelijke beoefening* (n. 7) 221–222, 293.

²³) See for the influence of Savigny in the Netherlands P. C. Kop, *Savigny en de wetenschap van het privaatrecht in Nederland in de negentiende eeuw*, TR 57 (1989) 117–134.

When we review the various approaches to studying and teaching Roman law from the nineteenth until the middle of the twentieth century, our conclusion must be that there was the more ‘pandectistic’ one, which emphasized the timeless importance of Roman dogmatics and concepts, and the more neo-humanistic one, which sought to understand Roman law, especially classical Roman law in its historical context. The former was more applicative, i.e. directed towards present-day law, than contemplative, i.e. directed towards distinct historical eras. The latter was more contemplative, but still applicative in referring to and comparing with contemporary law²⁴). Both approaches were historical in the sense that they acknowledged that Roman law developed during Roman Antiquity and both were a-historical in describing Roman law in the pandectistic framework, reflected in the Codes of civil law. At the same time the former approach was to a greater extent a-historical by presenting legal dogmatics and concepts, which had not existed in classical or Justinianic Roman law, whereas the latter was to a greater extent historical by being more reluctant in following these generalizations and the *Begriffsjurisprudenz* of the pandectists.

Both approaches had in common that they regarded the teaching of Roman law as an indispensable introduction to the principles and concepts of contemporary private law. At the beginning, however, for jurists such as Modderman, Roman law simply contained the principles and concepts, needed for handling the Code of civil law. For later scholars of Roman law, this had become less obvious. To them, Roman law was a perfect introduction to the system of contemporary private law. Although we term the first approach as ‘pandectistic’, since it provided a pandectistic-dogmatic framework for a non-pandectistic Code of law, it was not and could not have been pandectistic in the sense of applying Roman law to legal practice, since in the Netherlands the *Corpus iuris* was no longer a source of law. It also lacked the pandectistic programme of constructing a legal system for a future Code of Civil Law²⁵).

²⁴) For the distinction between application and contemplation see K. Luig, The history of Roman private law and the unification of European law, In: *Zeitschrift für Europäisches Privatrecht* 5 (1997) 405–427, 406–407. I do not use the term applicative here in the sense of actually applying to contemporary law as the pandectists would have used the term.

²⁵) On the other hand, textbooks on positive private law by scholars who had embraced Pandectism did result in a kind of pandectistic ‘*interpretatio passiva*’ of the *Burgerlijk Wetboek* which is still apparent.

III. The teaching of Roman law in the second half of the 20th century

The above provides us with the background for understanding the various ways Roman law was and is taught from the second half of the 20th century onwards. Three of such ways can be distinguished, *viz.* (i) a ‘pandectistic’ school, which uses Roman law materials to elucidate the principles of contemporary private law and ignores for the greater part the historical context from which these materials originate, (ii) a ‘neo-humanistic’ school, which focusses on classical Roman law, thereby merely referring to and comparing with contemporary law, and (iii) a ‘legal historical’ school, which treats Roman law as an integral part of the western legal tradition, from which our contemporary law developed. As a matter of fact, a specific method of teaching can bear evidence of more than one of these schools, albeit that some characteristics exclude each other.

(i) A ‘pandectistic’ school: Roman law as the legal system we still use:

The present ‘pandectistic’ school originates from a critical attitude towards the neo-humanistic approach of Roman law. In his inaugural address (1946) the Groningen professor H.J. Scheltema (1906–1981) criticized the neo-humanistic Romanists who would treat the pre-Justinianic sources unprofessionally. Many of them would not be sufficiently equipped to apply the purely historical method to these sources²⁶). Moreover, Scheltema regarded the new approach not to be a mere shift of emphasis, but as having replaced the legal method by a philological one²⁷). It is questionable whether this black-and-white image accurately reflected the reality of his days. Scheltema was nonetheless confident that university courses in Roman law should be of a distinct dogmatic nature, if they had to be of any value for contemporary jurists. From the outset he used his own lecture synopses (the famous ‘klappers’). In 1954, he made his vision on teaching Roman law more explicit in a preliminary advice. He maintained that, if one takes Roman law merely from a historical perspective, it will contain quite a lot of pointless information for future jurists. Thereby, he referred to the teaching of Roman law in France, but not to any particular practice in the Netherlands or Belgium²⁸). Scheltema’s

²⁶) H.J. Scheltema, *De nieuwere critiek op de Romeinsche rechtsbronnen uit den tijd voor Justinianus*, Groningen 1946, 8.

²⁷) *Ibid.* 3 note 1.

²⁸) Report of H.J. Scheltema in: *Prae-adviezen inzake de opleiding van de jurist*, uitgebracht voor de op 23 Februari 1954 te houden vergadering van het Ge-

synopses were elaborated and edited in 1984 under the title Mr. H.J. Scheltema's *Inleiding tot het Romeinse recht*, which appeared to be a textbook of a strong applicative nature²⁹). Roman law was described and explained at an elementary level and continuously related to the provisions of the Civil Code of 1838 and those of the New Civil Code, which was not yet promulgated. Oddly enough, the emphasis in the book was still on the reconstructed classical Roman law (with some references to later Justinianic alterations) and not on the law of the *Corpus iuris* itself. By all means 'pandectistic' was the relatively extensive general law of obligations. Although comparison (similarities and differences) held a prominent place in the book, the underlying thought was still that Roman law was not randomly chosen to be taught in a law faculty, but because it contains the essentials of contemporary law. Apparently, Roman law should be seen as a stage in the historical development towards our contemporary law, although in Scheltema's textbook this idea got stuck in an embryonic stage.

Scheltema was not the only one who criticized teaching Roman law in a "too historical" manner. Already in 1948, H.R. Hoetink (1900–1963), professor of Roman law at the Municipal University of Amsterdam, had pronounced explicitly upon the teaching of Roman law. Although in his own scholarly research Hoetink always proceeded in a historical way and also investigated the *Nachleben* of Roman law, he resisted a too historical approach of Roman law in legal education. He considered Roman law, as it was usually taught at that time, overly historical, demanding too much specialized, non-legal knowledge. In his opinion, scholarship of Roman law had lost its connection with positive law and offered future practitioners "a stone for bread"³⁰).

Scheltema's successor in Groningen, J.H.A. Lokin (1945), refashioned Scheltema's synopses to create the new textbook *Prota*. The first edition appeared in 1989 and by now the 10th edition has been published³¹). The preface

nootschap (= *Pro Excolendo Jure Patrio*), Groningen 1954, 19–32, 22. See on the teaching of Scheltema also E.W.A. Hensen. *Langs zelf gekozen paden – Het leven van H.J. Scheltema*, N.E.M. Pareau & Mr. J. Jer. van Nes, Amsterdam 1992, 119–121 and W.J. Zwolve, *Teaching Roman law in the Netherlands*, In: *Zeitschrift für europäisches Privatrecht* 5 (1997) 393–404.

²⁹) H.J. Scheltema, *Inleiding tot het Romeinse recht*, Groningen 1984.

³⁰) H.R. Hoetink, *Rechtswetenschap*, in: K.F. Proost/J. Romein (eds.), *Geestelijk Nederland 1920–1940, Deel II*, Amsterdam etc. 1948, 57–84, 80. The expression "a stone for bread" refers to Matthew 7.9–11.

³¹) J.H.A. Lokin, *Prota, Vermogensrechtelijke leerstukken aan de hand van Romeinsrechtelijke teksten* [1989], Groningen ¹⁰2016.

of the first edition says the following about the purpose of the Roman materials, presented in the book: ‘The texts should not in the first place bring to life the past but the present, and in this specific case even the future. For, they are selected in view of illustrating present-day questions of patrimonial law, and they are, moreover, discussed in connection with the provisions of the future Civil Code. Accordingly, Roman law, as explained on the basis of these texts, serves as material for comparison with present-day law. Thus, from the thousands of texts the Romans demised us, only those were chosen which are suitable for such a comparison, irrespective of the time they came into being³²). As a matter of fact, it can be queried whether contemporary concepts can be elucidated by ancient texts and whether these texts may be derived from divergent stages of legal development in Roman Antiquity. Scheltema had confined himself to an elementary description of the classical Roman law of property and obligations and to comparison with present-day law. However, in the book of Lokin it is not always clear which stage of development of Roman law is dealt with. Either this is only mentioned casually, or, within the treatment of one subject, various, successive rules of law are mixed up, without observing chronology³³). Moreover, in Prota certain Roman concepts are connected with contemporary law, while it is beyond doubt that these do not constitute the foundation of the present-day concept. Most of the time, it is neither possible to know for sure whether these may have served as model for the latter³⁴). Furthermore, for some present-day procedural rules we can find in the *Corpus iuris* only an initial impetus and, historically, these rules cannot possibly be related to the formulary procedure, which was abolished

³²) Ibid. p. I: “De teksten dienen niet in de eerste plaats het verleden te laten leven maar het heden en in dit bijzondere geval zelfs de toekomst. Want zij zijn geselecteerd om als illustratie te dienen van hedendaagse vermogensrechtelijke vraagstukken en worden bovendien besproken in wisselwerking met de bepalingen van het toekomstige Burgerlijk Wetboek. Het Romeinse recht zoals dat aan de hand van de teksten wordt uitgelegd dient dus als vergelijkingsmateriaal van het hedendaagse recht. Uit de duizenden teksten die de Romeinen ons hebben nagelaten zijn dan ook slechts die gekozen die zich voor zulk een vergelijking lenen, ongeacht de periode waarin zij zijn ontstaan.”

³³) For example, in the paragraph on the creation and extinction of servitudes, classical and Justinianic law alternate with each other arbitrarily and without any explanation, see Lokin, Prota (n. 31), G61, 177–179.

³⁴) For example, the *fiducia* which was acknowledged in Dutch case law before it was, in 1992, put aside by article 3:84 section 3 of the present-day Civil Code, did not derive from the *fiducia* of classical Roman law, see Lokin, Prota (n. 31), Z23, 118–120.

long before the days of Justinian. Nevertheless, the latter way of civil litigation is dealt with in Prota³⁵).

Can we still consider Prota to be a legal-historical textbook? Lokin takes the affirmative view: ‘And yet the way the texts are interpreted can be called historical or preferably legal-historical and this book is indeed a legal-historical book. Because the explanation of the old texts according to the present day is not something new, but as old as Roman law itself. It is a legal approach par excellence to extract the written rules of law, which are handed down, from the foundation of their creation and after such abstraction to approach these rules from just one perspective, viz. to what extent they may serve the solution or explanation of a contemporary problem³⁶’. The ‘legal approach par excellence’ reminds one of applying hermeneutics when reading texts from the past, as dealt with in the theories of Hans-Georg Gadamer (1900–2002), but Gadamer always emphasized that the hermeneutic approach elucidates the distance in time and, as a consequence, shows the characteristic features of our own time. It does not put Roman provisions on a par with present-day provisions. ‘Extracting rules of law from the foundation of their creation’ is something legal theorists do, creating a kind of logic of legal concepts. It is also what the German pandectists had done, but they were strongly criticised for this by Rudolf von Jhering (1818–1892). It is not entirely clear what Lokin meant when he spoke about the explanation of the old texts according to the present day (“de uitlegging van de oude teksten naar de eigen tijd”). He probably referred to the value Roman texts still can have for contemporary law, which is certainly possible. Yet, ascribing to ancient texts any value for contemporary law requires more than just pointing out similarities. It can only be achieved through a process of decontextualisation and resubstantialisation. In order to decontextualize, one should first establish the context, i.e. the circumstances (*Bedingtheiten*) within which the text came into being or was operative. Only then it is possible to abstract from that context, namely as far as it is incompatible with the present cir-

³⁵) Lokin, Prota (n. 31), P13 and P15, 54–55 and 55–56.

³⁶) Ibid. p. II: “En toch is de wijze waarop de teksten worden geïnterpreteerd wel degelijk historisch of liever rechtshistorisch te noemen en is dit boek wel degelijk een rechtshistorisch boek. Want de uitlegging van de oude teksten naar de eigen tijd toe is niet nieuw maar zo oud als het Romeinse recht zelf. Het is een bij uitstek juridische wijze van benadering de overgeleverde geschreven rechtsregels uit de bedding van hun ontstaan te lichten en ze, aldus geabstraheerd, te beschouwen vanuit slechts een gezichtshoek, nl. in hoeverre zij dienstig kunnen zijn aan de oplossing of de verklaring van een eigentijds vraagstuk.”

cumstances, and grant the remaining ‘core’ a role in the present-day context³⁷). To put it differently: whoever wishes to establish the intrinsic value of an old text for present-day law, should first trace the ‘core’ of the text. But to achieve this we need context, and we can only dispose of that context after it has been established³⁸).

As a consequence, Prota evokes manifold questions. It does explain contemporary private law by means of Roman law texts, but it seems as if the scholarly sound way of dealing with historical materials is put aside for didactical purposes³⁹). Can that be justified in an academic setting? Moreover, can it be justified to create an amalgam of elements, derived from divergent stages of Roman law, which were not at one moment in time or within one and the same territory connected to each other or parts of one and the same legal system? What remains are isolated historical texts for comparison, but for that purpose we can select texts from any legal tradition and the choice for Roman law becomes arbitrary.

(ii) A ‘neo-humanistic’ school: Roman law as the law of an ancient society:

A number of other textbooks were and are of a more contemplative nature, based on the neo-humanistic approach with major attention for classical Roman law, which the authors commonly also observe in their scholarly work. At the same time these books usually stick to a pandectistic structuring of the materials. Moreover, as a concession to the more applicative approach – after all, the textbooks were written for courses in the law faculties – they do contain references to the Code of civil law as in force. Examples are the Dutch elaboration (1967) of Kaser’s *Kurzlehrbuch* by F.B.J. Wubbe (1923–2014)⁴⁰), the book by R. Derine (1926–1987), who taught in Louvain

³⁷) Cf. K.W. Nörr, *Das römische Recht zwischen Technik und Substanz: Bemerkungen zu seiner Rolle am Ende des 20. Jahrhunderts*, in: *Zeitschrift für Europäisches Privatrecht* 2 (1994) 67–76, 74ff.

³⁸) *Furtum* in Roman law, for example, is not the same as theft in contemporary law, not even when we expand the latter with embezzlement and joyriding. *Furtum* is handling a thing as an owner would do but without being entitled. That is much more extensive than theft and stems from an entirely different social setting than theft as it is understood as a crime nowadays. The comparison is useful, because it can show the defects of theft as a contemporary legal concept. *Furtum*, however, does not say anything about present-day theft, which is based on different criteria.

³⁹) Cf. my review of the book in: *Rechtsgeleerd Magazijn [RM] Themis* 163 (2002) 223–226.

⁴⁰) M. Kaser, *Romeins privaatrecht, voor het gebruik aan Nederlandse universiteiten bewerkt door F.B.J. Wubbe*, Zwolle 1967 (first edition).

and Antwerp⁴¹⁾, and that of the Utrecht professor J.E. Spruit (1937)⁴²⁾. The concise textbook by J.A. Ankum (1930–2019), who taught many years at the University of Amsterdam, is the only one lacking references to contemporary law⁴³⁾. In general, these books deal with the Roman texts in a scholarly sound way. They do not, however, succeed very well in connecting Roman law with contemporary law. In the first place they show no or only little legal development. They just refer to contemporary law, thereby passing over the intervening stages (medieval *ius commune*, reception of Roman law, codification), a phenomenon sometimes termed as *salto mortale*. Secondly, they focus on classical law, whereas the *Corpus iuris* itself constitutes the basis for the civilian tradition of the European continent.

(iii) A dispute between the ‘pandectistic’ and the neo-humanistic school (1992–1993):

In 1992 the Leiden professor W.J. Zwolve (1949) declared himself openly against the ‘neo-humanistic’ approach in the compulsory courses at the law faculties. He did so in front of an international audience of Romanists, who for the greater part were teaching and researching on the basis of the neo-humanistic principles which Zwolve contested, *viz.* at the annual conference of the Société Internationale ‘Fernand de Visscher’ pour l’Histoire des Droits de l’Antiquité, which took place that year in Amsterdam⁴⁴⁾. His paper evoked *inter alia* a strong reaction from Ankum. Both views were put to words again in concise papers, published one year afterwards in the journal *Ars Aequi*⁴⁵⁾.

In the wake of Scheltema, Zwolve made an issue of the antithesis between the historical and legal approach towards Roman law. Without describing what these two exactly entail, he suggested they exclude each other. He characterized the legal approach as following the method of Alberico Gentili (1552–1608) and the pandectists, which remark brought about a confusion of tongues. After all, Gentili and the pandectists had written about Roman law as living law, whereas in 1992 Roman law as a source of law had been

⁴¹⁾ R. Derine, *Schets van het Romeins privaatrecht, Uitwendige en inwendige rechtsgeschiedenis*, Antwerp 1982.

⁴²⁾ J.E. Spruit, *Cunabula iuris, Elementen van het Romeins privaatrecht*, Deventer 2003.

⁴³⁾ J.A. Ankum, *Elementen van Romeins recht*, Zwolle 1976.

⁴⁴⁾ Previously W.J. Zwolve had already expounded his view on teaching legal history and his objections against the ‘neo-humanistic’ approach, see his *Het Janushoofd der Rechtsvergelijking*, Groningen 1988.

⁴⁵⁾ W.J. Zwolve, *De toekomst van het Romeinse recht*, in: *Ars aequi* 42 (1993) 455–459; J.A. Ankum, *Stenen voor brood*, in: *Ars aequi* 42 (1993) 459–463.

abolished for a long time. Accordingly, Ankum replied that a return to the pandectistic method is impossible. Whoever maintains something else is giving his students ‘a stone for bread’, he argued. Here Ankum used the same expression as Hoetink had done in 1948, when objecting against a neo-humanistic teaching of Roman law. Zwolve stated that the Dutch Romanists of the 19th century had emphasized Roman law as living law, but that could not be correct, since Roman law had lost its validity before that time. What Zwolve probably meant to say here was that these Romanists emphasized the continued effect of Roman law in the civil law of their own days. The legal approach Zwolve had in mind when talking about the pandectists must be something like teaching Roman law with particular attention for the substantive and procedural norms of present-day law and always in comparison with that law.

And what made the historical approach so historical? Was it the fact that it kept in mind the specific stage of legal development from which a specific Roman law text derived? Scheltema had done exactly the same in his posthumously edited textbook. The historical approach had to be something like emphasizing the original historical context of the Roman texts. But ‘historical’ and ‘legal’ are not opposites and certainly do not exclude each other. All available textbooks in the 1990s, except Prota, were in fact both historical and legal. There were differences in emphasis and sometimes even considerable differences, but that is something else.

Basically, Zwolve and Ankum agreed in many respects. Both acknowledged the value of Roman law as a tool for a better understanding of contemporary private law. Both acknowledged the value of Roman law for showing that law has developed historically. Ankum explicitly referred to the latter purpose of teaching Roman law, although one could argue that the neo-humanistic school can also be said to be fixated on a flat surface, albeit this time that of classical Roman law. In Zwolve’s paper this aim of teaching Roman law remained neglected but was still present. Without reference to any source, he quoted Joan Melchior Kemper (1776–1824) and by doing so he endorsed the latter’s statement that Roman law should make the student familiar with ‘the fundamental pillars on which are raised until now all the more recent systems of legislation’ (“de grondzuilen waarop tot nu toe al de nieuwere stelsels van wetgeving zijn opgehaald”) and make him/her aware of ‘the roots of most of the provisions of the new law’ (“de oorzaken der meeste vaststellingen van het nieuwe regt”)⁴⁶. Moreover, if Roman law had

⁴⁶) Verhandeligen, redevoeringen en staatkundige geschriften van Jhr. Joan Melchior Kemper, ed. J. de Bosch Kemper, vol. I, Amsterdam 1834, 343.

not played any role in the historical development of our system of private law, how would it be capable of providing the student insight into this system?

In the dispute between Zwolve and Ankum concerning the best way of teaching Roman law, more may have been at stake than just the things they adduced in their papers. Exegesis of Digest texts, for example, was a major element in teaching Roman law according to the neo-humanistic approach, whereas the ‘pandectistic’ approach tended towards a purely dogmatic and doctrinal programme, rendering the exercise in analysing primary texts of a case-based nature redundant or anyhow less necessary. Judging by the two papers, we can say that the entire dispute between Zwolve and Ankum in fact boiled down to two questions: (i) to what extent should contemporary law be incorporated in teaching Roman law? and (ii) which stage of development of Roman law should hold a prominent place?

As regards the first question, it is remarkable that Zwolve waged war against Roman law as a ‘mere historical discipline’, since, in fact, it was nowhere taught in such a way. In all textbooks and university courses of the time there was attention for contemporary law, such as in the frequently used textbook by the Leiden professor Robert Feenstra (1920–2013), of which the first edition had appeared in 1973⁴⁷). It is true that in the book of Scheltema comparison with contemporary law took a more prominent position by referring to similarities and differences, but the claim that this was lacking in the other books is untenable. It may be noted here, incidentally, that attention to contemporary law when teaching Roman law is by all means justified. In legal education we should not avoid positive law and the great value of Roman law consists in the fact that it can teach us to put contemporary law into perspective, which goal can be reached through comparison. Even in a mere historical approach towards Roman law texts, sound hermeneutics require that we are aware of the present-day reality, for if we are, we will be better aware of our own premises and preconceptions.

As regards the second question, Zwolve argued in favour of teaching Roman law on the basis of the *Corpus iuris* itself or the *ius commune* and not on the basis of classical law⁴⁸). He suggested, somewhat exaggeratedly, that classical law is rather the product of modern conjectures. Following Scheltema, but without referring to him, he spoke about ‘philological dilettantism’

It may be that here already Zwolve had the historical-comparative method in mind, which he would follow in his own textbook on the law of property.

⁴⁷) R. Feenstra, *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht*, Inleidende hoofdstukken, Leiden 1994.

⁴⁸) At the end of his paper, however, he opened the door again for classical law.

within Roman law scholarship⁴⁹). In this way he did no justice, as Ankum rightfully observed, to the Romanists of his time. Scheltema had spoken in 1946, not in 1992, and in the meantime post-war scholarship had overcome the unrestricted chase after interpolations. Moreover, Zwolve ignored the fact that change was on its way. The textbook of Feenstra, mentioned above, and a series of smaller exercise books (see below) paid considerably more attention to the *ius commune*.

Ankum maintained that choosing a certain stage of development (classical law, Justinianic law, *ius commune*) for teaching Roman law is a matter of efficiency. In so doing he ignored the arguments adduced by Zwolve. Further, Ankum's preference to consistently stick to classical Roman law, is not convincing. The suggestion to base the teaching of Roman law on the Corpus iuris or the *ius commune* is entirely plausible. I fully endorse Zwolve's arguments and will add some more below. As regards the question in which way Roman law as a legal discipline should be taught, Zwolve remained vague. He spoke about emphasis on private law in force and systematic comparison with the law of European countries of major importance. Presumably he had his own textbook in mind, in which he had adopted such an approach.

This textbook on the law of property, *Hoofdstukken uit de geschiedenis van het Europese privaatrecht* (part I), appeared that very year (1993). It was not intended for a compulsory introductory course in Roman law, but for a more advanced optional course of 'comparative private law'⁵⁰). Accordingly, the approach could be and indeed was less 'pandectistic' and more 'historical'. In the book there is certainly more attention for legal development, although the latter is sometimes still subordinated to private law dogmatics. There is a strong emphasis on early modern jurists as Arnold Vinnius (1588–1657) and only little attention for the medieval foundations these authors were building on, such as the Gloss and the works of Bartolus (1313–1357). There is also attention for the legal pluralism of the Middle Ages and the interaction with other legal traditions, such as customary law of a Germanic origin.

In this textbook, Zwolve followed what he called the 'comparative-historical method' i.e. researching the historical development of legal concepts and rules in comparison with the major continental systems of law. One can question, however, whether the texts from primary sources are always sufficiently contextualized in order to be subsequently decontextualized (see above). It

⁴⁹) Scheltema, *De nieuwere critiek* (n. 26) 8.

⁵⁰) See the introduction in the first edition: W. J. Zwolve, *Hoofdstukken uit de geschiedenis van het Europese privaatrecht*, I: Inleiding en zakenrecht, Deventer 1993, VII.

seems as if all cited learned jurists i.e. from the glossators until the end of the 18th century, were participating in one and the same debate⁵¹). On an abstract level, later jurists may indeed have pronounced upon the doctrines of earlier jurists. This could happen, since the *Corpus iuris civilis* was their common and continuous paradigm for hundreds of years. It can be tempting to include many authors, past and present, in a theoretical present-day debate. Nevertheless, every statement has its own historical context, determining its exact meaning. Without observing this context, it is impossible to position the materials in a historical development. Furthermore, in view of the fact that Zwolve had previously pled for taking Justinianic law as a starting point, had qualified classical law as ‘the result of modern conjectures’ and, when discussing the purpose of his book, maintained that the neo-humanistic approach renders Roman law superfluous for legal education⁵²), it is surprising that he repeatedly suggested that classical Roman law, e.g. the doctrine of the classical jurist Paul on the transfer of possession, had influenced the *ius commune*⁵³). The jurists, standing in the tradition of Bartolism and the *mos italicus*, never read distinct opinions of individual Roman jurists in the *Corpus iuris*, let alone that it first has to be shown that the Digest texts referred to, edited in the sixth century, accurately reflected the opinion of Paul who lived at the beginning of the third century. In a similar way, it remains peculiar which role the Institutes of Gaius, only discovered in 1816, could have played in the civilian tradition of the Middle Ages and the early modern era. It was the humanist jurists, and not the practice-oriented jurists of Bartolism and the *mos italicus*, who had studied the Epitome Gai, handed down through the *Lex Romana Visigothorum*. It was typical of the Dutch Elegant School,

⁵¹) This is reminiscent of a category of literature, popular in the 18th century, in which deceased celebrities in the next world are discussing the present, such as the series *Maandelyksche berichten uit de andere waerelt, of de spreekende dooden* bestaande in redeneeringen tussen allerhande verstorvene potentaten en personagien van rang, zo van den deegen, tabbaart, letteren, als anders. Similarly, the Frenchman Charles Dumoulin (1500–1566) is said to have entered into a debate with the Italian Azo († 1230) and the Dutchman Cornelis van Bijnkershoek (1673–1743) with Dumoulin and Azo; cf. F. Brandsma, *Gemeen recht in Groningen, Enige opmerkingen over de matiging van bedongen boetes door de rechter*, Groningen 2000, 24.

⁵²) According to the Dutch phrasing of this statement, the Romanists had stained (“bevelekt”) themselves with the stigma of redundancy; see Zwolve, *Hoofdstukken* (n. 50) ¹1993, 52, ³2006, 70. The German edition reads “mit dem Stigma [...] gezeichnet”, see W.J. Zwolve/A.J.B. Sirks, *Grundzüge der europäischen Privatrechtsgeschichte, Einführung und Sachenrecht*, Vienna 2012, 91.

⁵³) See Zwolve, *Hoofdstukken* (n. 50) ³2006, 112–120.

and not of the Old Authorities of Roman-Dutch law, to attempt to reconstruct on the basis of Digest texts the Gaius' Institutiones, as did Schultingh in his "Jurisprudentia vetus ante-Justinianea"⁵⁴). Accordingly, it is impossible to refer to the Institutes of Gaius when discussing the *ius commune*-tradition⁵⁵). Notwithstanding this criticism, Zwolve's textbook was a great step forward towards a more historical approach to the development of private law and an impressive achievement. Its success in academic teaching is well-deserved.

It is remarkable that outside the Netherlands the opposing schools i.e. the mere historical, contemplative school, on the one side, and the 'pandectistic', applicative one, on the other, were at the time strongly involved in a discourse concerning the question whether Roman law and legal history can actively contribute to a future unified European private law (see also below)⁵⁶). At the European level a change of paradigm had taken place. Legal history had fallen under the spell of Europeanization and internationalization and was no longer directed at discovering the roots of national law. Accordingly, legal historians and Romanists were facing new questions and new challenges⁵⁷). In the dispute between Zwolve and Ankum, however, there were hardly any traces of this burning issue. In Zwolve's Hoofdstukken, on the other hand, there are clear traces of Europeanization, given the copious and fruitful comparison with French and German law.

(iv) A 'legal historical' school: Roman law as part of the continental legal tradition:

However, in the meantime the entire debate was superseded by the emergence of an alternative approach. For a long period, the faculties held separate chairs for Roman law and history of indigenous law (Oud-Vaderlands recht). Nonetheless, it was now increasingly acknowledged that such a distinction was artificial, and that Roman law had been an organic part of the legal devel-

⁵⁴) The *Gaius Augustodunensis* was only discovered in 1898.

⁵⁵) There are fourteen references to or quotations from the Institutes of Gaius, which in the index of sources are positioned under the heading *ius commune*, see Zwolve, Hoofdstukken (n. 50) 32006, 577. In the German edition only six references were adopted and now under the heading "sonstiges römisches Recht", see Zwolve/Sirks (n. 52) 522.

⁵⁶) The idea was endorsed by Lokin, see J. H. A. Lokin, Redactionele kanttekening, Het pit en de kern, in: RM Themis 153 (1992) 305–307.

⁵⁷) F. J. Andrés Santos, Was erwartet sich die Geschichte des Europäischen Privatrechts von der deutschen Rechtswissenschaft?, in: C. Baldus/P.-C. Müller-Graff (eds.), Die Generalklausel im Europäischen Privatrecht, 2006, 93–114, 95–106.

opment which resulted in contemporary law⁵⁸). In order to make this visible, the connecting links between the *Corpus iuris* and the law as in force had to be revealed. It was L.J. van Apeldoorn (1886–1979), professor of legal history at the Municipal University of Amsterdam, who, in his textbook “Inleiding tot de studie van het Nederlandsche recht”, when describing the principles of the Dutch legal system of his days, incorporated Roman law, *ius commune*, early modern continental legal doctrine and practice, and French and German legal scholarship of the nineteenth century⁵⁹). It was Hoetink who in his inaugural address at the same university (1935) argued in favour of more attention for the medieval interpretation of Roman law and its reception. He criticized the primarily historical approach towards Roman law, with its emphasis on classical law, and suggested that the sources of Roman law should be investigated not only from the perspective of classical law, but also had to be connected with legal scholarship of the Middle Ages and later periods⁶⁰).

Gradually, the idea won ground that it was scholastically questionable to present classical Roman law as the precursor of contemporary law (the *salto mortale*-approach). The Leiden professor Robert Feenstra, who had first studied under van Apeldoorn and later under Hoetink, frequently urged his students to trace the historical development of a concept of law or a legal rule by departing from contemporary law and looking back into the past to see which precursors could be discerned: the step by step going back to the origin of a certain institution.

In this search into the past we will many times encounter Roman law, but we cannot escape from its medieval or early modern manifestations. As was explained above, Dutch law and specifically the *Burgerlijk Wetboek* of 1838 had its roots in early modern law, building again to some extent on the tradition of Bartolism. Although the present-day *Burgerlijk Wetboek* (1992) is of a more pandectistic nature than the previous one, there is nevertheless a considerable continuity in the transition of private law under the previous code to that under the present-day code. This implies that, when searching the past, it is impossible for Dutch private law to bypass the entire *ius commune* period in order to end up in the Roman law of Antiquity. That would

⁵⁸) This acknowledgment was unfortunately frequently used by university policy-makers to economise through fusing the chairs of Roman law and indigenous legal history.

⁵⁹) L.J. van Apeldoorn, *Inleiding tot de studie van het Nederlandsche recht*, first edition Zwolle 1933, 13th edition Zwolle 1955.

⁶⁰) Hoetink's address delivered on 28 January 1935; H.R. Hoetink, *De achtergrond van het Romeinse recht*, Haarlem 1935.

be a *salto mortale* backwards. This may be different for German law because the Bürgerliches Gesetzbuch of 1900 came into existence out of a hypertrophied systematization of ‘classical’ Roman law by the pandectists, with only minor influence of indigenous Germanic law; although it can also be argued that the writings of the *usus modernus*-scholars to some extent must have influenced the pandectists.

Through such a retrograde method, which uncovers gradually each stage of development, we will trace the genesis of a legal concept or rule through time. However, in each stage, one and the same Roman text will have its own context, determining its purport. Since, there has never been a uniform use of Roman law within the tradition of *ius commune*, but a continuously evolving interpretation depending on changing circumstances, there is no such a thing as one interpretation of a Roman law text. There are many interpretations⁶¹). Moreover, we will also see that Roman law doctrine is commonly not the only origin of a certain rule of law. Legal concepts or one or more of their elements may go back to indigenous customary law, canon law, feudal law, the *lex mercatoria*, Natural Law-theories, etc. Frequently, the genesis of a legal rule or concept is a complicated process, not simply a matter of reception or legal transplant; it can be based on many traditions and influenced by many circumstances. This reality unsettles the ‘pandectistic’ idea that Roman law is essentially the legal system we still use.

The retrograde method often resulted in a kind of history of legal dogmatics, in German termed Dogmengeschichte i.e. a historical-comparative study of private law concepts, with sometimes more and sometimes less attention for the other pillars of contemporary law⁶²). It can, at least partly, explain why contemporary law is as it is. Some scholars, such as the comparatist and legal historian Reinhard Zimmermann, maintained that the *ius commune*, as it was now mapped out by Dogmengeschichte, could contribute to a future, unified European private law by tracing the origins of the various differences between the national codes of private law and in this way, through clarifying the context, opening a way to harmonization⁶³). The

⁶¹) Cf. R. Feenstra, *Interpretatio multiplex*, Een beschouwing over de zogenaamde crisis van het Romeinse recht, Zwolle 1953. Cf. for a similar approach to Byzantine law texts, contained in the Basilica, H. de Jong, *Using the Basilica*, ZRG RA 133 (2016) 286–321.

⁶²) See about this method C. J. H. Jansen, *Wetenschappelijke beoefening* (n. 7) 141–142. The author suggests that also Scheltema adhered to this approach, but this can be questioned.

⁶³) His *opus magnum* was R. Zimmermann, *The law of obligations*, Roman

harmonized private law of Europe could be built on a renewed *usus modernus pandectarum*⁶⁴). In such a way, Dogmengeschichte had an applicative nature and was sometimes labelled as neo-pandectistic. However, in the 90s Dogmengeschichte also evoked strong criticism from scholars adopting the more contemplative approach. Especially legal historians from the Max Planck-Institute for European Legal History at Frankfurt am Main, which after the retirement in 1980 of its director Helmut Coing (1912–2000) adopted a new line of investigation, rejecting the ideas of Zimmermann. Moreover, some of them criticized Dogmengeschichte as such. They spoke about a 19th century fusion (Vermischung) of legal history and legal dogmatics and made clear that what may seem to be the rebirth of a legal institution from the past, can actually be something entirely different, serving an incomparable purpose⁶⁵). Pursuing Dogmengeschichte became for many years a scholarly-charged occupation.

One of the dangers of the retrograde method, resulting in Dogmengeschichte, consists in neglecting the socio-legal context of each separate link in the historical chain. Not only does such a context determine the precise purport of the individual link, it also determines its function in legal practice. If we want to investigate, for example, the historical development of protection of possession and take contemporary Dutch law as a starting point, we will find that possession is nowadays protected by a delictual (tort) remedy (Article 6:162 BW) and only in exceptional cases by a possessory remedy (Article 3:125 BW). However, in a retrograde investigation we cannot restrict ourselves to protection of possession within the law of obligations, since in the past protection through possessory remedies, which eventually can be linked to the interdicts of Roman law doctrine, was dominant. Thus, the focus should be on a specific factual problem (what can be done against infringement of possession?) and not on the legal concept (a single, specific remedy, either petitory or possessory). In Dutch law, the only reason the delictual remedy can be used much more frequently is because it has acquired

foundations of the civilian tradition, Cape Town 1990, which describes the dogmatics of the law of obligations from the Roman law of Antiquity until the present-day Codes of Law.

⁶⁴) R. Zimmermann, Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit, in: Juristenzeitung 47 (1992) 8–20. See also criticism of Osler who questions whether something like European legal history actually exists: D. Osler, The myth of a European legal history, in: Rechtshistorisches Journal 16 (1997) 393–410.

⁶⁵) See the contributions of Kübler, Simon and Stolleis in Arena, Rechtshistorisches Journal 12 (1993) 259–345, 310–311 and 324.

a rather wide range of application, wider, for example, than in German law. Similarly, the purpose and function of one and the same legal institution may have changed dramatically through the ages. Community of property as the common arrangement when entering into matrimony was introduced in the Netherlands in the Civil Code of 1838. The Utrecht solicitor Christiaan Lodewijk Schuller tot Peursum (1813–1860), when in 1841 commenting upon this Code, described this community as an expression of the unifying bond between spouses: Since spouses are just one flesh, and their souls ‘passionately merged together, linked to each other and connected’, there should neither be any distinction between them as regards the ownership of things⁶⁶). Before that time marital community of all property was not generally the case. Going back to the times of the Dutch Republic, we find it in all Provinces and territories except Friesland, Groningen and Limburg⁶⁷). However, the institution in Roman-Dutch law had little or nothing to do with ‘being one flesh’, but rather with preventing merchants from escaping liability or accountability. Community of property was construed as a contract of partnership (*societas*) and was favourable to creditors in commerce; and it should not surprise us, that it can also be traced back to an important trading city such as Hamburg⁶⁸). In short, when applying a retrograde method, one should always be aware of the fact that in the past the function of legal concepts may be different and that previously other legal institutions and concepts may have served the same or comparable purposes. Accordingly, not the legal institution or dogma should serve as the connecting factor through the ages, but the problem or comparable problem it intends to solve. Only when Dogmengeschichte carefully observes the functionality of legal concepts, can we come to grips with the historical development of law. Accordingly, our retrograde method should always be of a genetic-functional nature.

The retrograde method and the desire to trace the historical development of law also found their way into the academic teaching of Roman law and legal history. In the Netherlands, there was a growing awareness that for

⁶⁶) C. L. Schüller, *De Nederlandsche wetboeken met aantekeningen*, I: *Burgerlijk Wetboek*, Utrecht 1841, 41: “Gemeenschap: omdat, gelijk de echtgenooten slechts één vleesch zijn en hunne zielen ‘gloënde aanéengesmeed en vastgeschakeld en verbonden’, zoo ook geen onderscheid in den eigendom der goederen tusschen hen behoort te zijn.”

⁶⁷) H. Nienhuis, *Akademische voorlezingen over het Nederlandsch Burgerlijk Regt*, 1.1, Groningen 1849, 403ff.

⁶⁸) Hugo de Groot, *Inleidinghe II.11.8*; for Hamburg see J. Goldfeld, *Ueber das Hamburgische Eheleiche Güterrecht*, Hamburg 1888.

elucidating the foundations of contemporary law, we cannot limit ourselves to describing classical Roman law and merely refer to the provisions of the Civil Code as in force. In 1973, Feenstra published the first edition of his excellent textbook on Roman law, mentioned above, which outlined the strong historical relationship between Roman law, on the one hand, and contemporary law, on the other, by discussing selected issues also in the context of *ius commune* as well as the era when private law was codified⁶⁹). Compared to the textbook of Scheltema, it showed much more legal development through the ages, but was less detailed in comparing classical Roman law with contemporary law (Civil Code, case law and New Civil Code). Also, the *Hoofdstukken uit de geschiedenis van het Europese privaatrecht* by Zwolve, mentioned above, dealing with (parts of) the law of property, emphasized the legal development of private law within a European context. For various narrower fields of private law, less extensive textbooks were composed, revealing the historical development through the centuries⁷⁰). As a concession to the educational purpose of these issues, legal development was commonly restricted to the civilian tradition. Although the retrograde method renders the study of classical law almost redundant (see below), the vast majority of these textbooks still discussed it extensively. The reason for this may have been, that the authors still sought alliance with the traditional teaching of Roman law, inspired by the neo-humanistic school.

⁶⁹) A textbook following a similar pattern is L.L.J.M. Waelkens, *Causa civilium, Handboek Romeins recht*, Leuven ³2014, also published in English translation under the title *Amne adverso*, Leuven 2015. I will not comment on the Belgian textbooks which treat the history of private law usually in a historical, but rather concise way, such as D. Heirbaut, *Privaatrechtsgeschiedenis van de Romeinen tot heden*, Ghent ³2013, and D. De Ruyscher, *Westers recht in ontwikkeling, Privaat- en publiekrecht van Rome tot vandaag*, Mechelen 2011. The textbook by Bart Wauters only deals with external legal history; see B. Wauters/M. de Benito, *The history of law in Europa, An introduction*, Cheltenham/Northampton 2017.

⁷⁰) See the series 'Rechtshistorische cahiers' published from 1979: No. 1 (property) by G.C.J.J. van den Bergh; No. 2 (contract) by R. Feenstra; No. 6 (delict) by R. Feenstra (later elaborated by L.C. Winkel); and No. 7 (sale breaks hire) by E.J.H. Schrage; see also the series 'Juridische reeks, Vrije Universiteit' published from 1986: No. 9 (unjust enrichment) by J. Hallebeek/E.J.H. Schrage; No. 12 (transfer of ownership) by J.H. Dondorp/E.J.H. Schrage; and No. 15 (delict) by J.H. Dondorp; see also E.J.H. Schrage, *Van delict tot onrechtmatige daad* (= *Ars Aequi cahiers, Rechtsvergelijking en rechtsgeschiedenis* '42), Nijmegen 1998.

IV. Premises for teaching Roman law

Given the state of teaching Roman law and legal history in the Netherlands by the end of the twentieth century, we can formulate a number of premises, which in my opinion should underlie, in the near future, both the teaching of these subjects and the corresponding textbooks.

(i) An applicative approach:

In a law-school, the teaching of legal history should be of an applicative nature, albeit not in the literary, pandectistic sense of applying Roman law to the present or future society, but in the sense of ‘related to positive law’. It would be inconceivable if scholars, employed in a faculty of law and educating future lawyers, would fully withdraw from positive law. Their teaching should provide their students with an intellectual bonus. As was shown above, we can discern two purposes of teaching Roman law to future lawyers, *viz.* elucidating the system of contemporary private law, and, secondly, showing how law develops through time. In recent decades the latter purpose has gained importance. The Dutch Civil Code of 1992 is further removed from the *Corpus iuris* than its predecessor was. Moreover, compared to the nineteenth and early twentieth centuries, we are nowadays inclined to adapt the law whenever that is regarded as desirable, which makes it all the more relevant to impart to students the awareness that, as time goes on, law is always changing. Teaching dogmatics, particularly the distinction and interrelation between the law of property and the law of obligations, is not easy to realize within a short period of seven weeks, which is nowadays the usual duration of a Dutch law course⁷¹). Legal development, on the other hand, can be shown in such a course on the basis of historic materials related to a certain question or a certain case⁷²). Suitable materials for such a course can be traced by applying a retrograde method. If this leads to a certain *sedes materiae* in the *Corpus iuris*, the same texts can be contextualized various times, e.g. in the *Corpus iuris* itself, in the Gloss, in Roman-Dutch law, etc. Subsequently, they can be decontextualized (what is the hard core abstracted from the context?) and resubstantialized (which elements of this hard core are

⁷¹) I leave aside here the didactical problem whether such a short period of teaching is compatible with the academic character of education in a certain field. It certainly does not offer much time for in-depth reflection.

⁷²) I fully endorse the view that a Roman law course can perfectly serve as an introduction to national and international private law, but such a course will require more time than just seven weeks. Cf. also J. M. Schermaier, *Römisches Recht für Juristen?*, Index 39 (2011) 78–89.

relevant for the next step in legal development?). By so doing, the dynamic character of law can be shown, as well as the historic formation of contemporary law. Moreover, this method leads to critical reflection and profound insight into positive law, which is an essential value in academic legal education. Courses and textbooks, based on this kind of research, are applicative in their connecting historical materials to the law of today. At the same time, they are contemplative in the contextual approach towards the various links in the development process. A retrograde method for selecting materials (searching the genetic-functional links from the present into the past) does not exclude the possibility of presenting these materials in a chronological order (from the past to the present).

(ii) A connection between research and teaching:

University policymakers commonly emphasize the coherence which ideally exists between scholarly investigation and academic teaching: the old Humboldtian ideal. When lecturing, scholars cannot and should not dissociate themselves from their research activities. On the contrary, it is their task par excellence to introduce students into their discipline, which includes the transfer of both knowledge and research skills. They should allow and enable their students to get an inside view of what scholarly investigation entails, such as the application of hermeneutics to primary legal sources. Accordingly, academic research should to a great extent be determinative for academic education. This is exactly what happens when the teaching of legal history is based on a retrograde method and on an approach towards Roman law as an integral part of the continental legal tradition. In so doing, a greater distance in time will also have the educational advantage of making more elements of the research method explicit and easier to understand.

The practitioners of today's 'pandectistic' teaching usually display a certain dualism. Their research is often historical, whereas their teaching is a-historical. In their research they approach the primary materials in a scholarly sound way, whereas in their teaching they subordinate this approach to didactical purposes. Accordingly, the coherence between research and teaching will go astray. Moreover, it can be queried whether in an academic setting it is permissible to evoke an image of Roman law texts which is not in conformity with the scholarly understanding of these texts. It would be like pretending the Civil Code of 1811 or that of 1838 had automobiles in mind, for example, when dealing with traffic. When we do this, we do not take our students seriously as future jurists and scholars; we underestimate their intellectual capacities, and deliberately put them on the wrong track. Because

‘pandectistic’ textbooks are nevertheless presented as historical, it can happen that young scholars, even in their dissertations, refer to these books or adopt their a-historical approach⁷³).

(iii) The civilian tradition is not the only one:

The genetic-functional retrograde search for legal development as a method of legal historical investigation requires an entirely different kind of dealing with the sources of Roman law than usually adopted in the ‘pandectistic’ or neo-humanist tradition. Roman law is no longer the independent system of law which we can consider as the precursor of present-day private law; neither is Roman law just the law of an ancient society. From the retrograde perspective, it would be entirely arbitrary to take just Roman law – no matter whether this is classical or Justinianic Roman law – as the starting point in the past of a development which ends in the present. Rarely, if ever will a retrograde search lead to only the *Corpus iuris civilis*. The nineteenth century process of codifying law was complicated and the process of reception of Roman law in the early modern time even more complicated. The way back will lead us to a world of legal pluralism. Early modern law was characterized by hybridity, an amalgamation of various unlike elements, originating from a plurality of legal bodies (Roman law, canon law, indigenous customary law, *lex mercatoria*)⁷⁴ and was shaped by intellectual movements which were determinative for legal thinking, such as those of Early Modern Scholasticism and Natural law⁷⁵). As a consequence, textbooks on Roman law have to give way to textbooks on legal history, which surely will discuss the Roman roots of present-day law, but always in a dialectical correlation with other legal traditions.

(iv) There is no civilian tradition prior to the glossators:

The Roman law which the retrograde search eventually will lead us to is that of the Middle Ages and not that of classical Antiquity. Zwölve rightly

⁷³) J.E. Jansen, *Bezit te kwader trouw, verkrijgende en bevrijdende verjaring, Een leerstellige rechtsvergelijkende studie op historische grondslag*, Den Haag 2011, 31, 33 and 34; see also the review of this dissertation by Sirks in: *RM Themis* 173 (2012/2) 100–103.

⁷⁴) See the excellent introduction in S.P. Donlan/D. Heirbaut (eds.), *The Law’s Many Bodies, Studies in Legal Hybridity and Jurisdictional Complexity*, c 1600–1900, Berlin 2015.

⁷⁵) For the influence of moral theology on the law of obligations see W. De-cock, *Theologians and contract law, The moral transformation of the ius commune* (ca. 1500–1650), Leiden 2013, and N. Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution, Außervertragliche Ausgleichsansprüche im frühneuzeitlichen Naturrechtsdiskurs*, Tübingen 2013.

suggested to teach Roman law on the basis of Justinianic law and not on the basis of reconstructed classical law⁷⁶). There are also sound reasons to end our retrograde search in Justinianic law as it was understood by the early glossators⁷⁷). Medieval legal scholarship adopted the *Corpus iuris civilis* as a coherent work. It was a code of law, promulgated by one and the same legislator. It is true that also in the sixth century, when the various parts of the *Corpus iuris* received force of law, they were seen as parts of a consistent legislation, expressing the will of the legislator (Justinian). But in Western Europe the *Corpus iuris civilis* had no chance to function as such, at least not for a considerable period. From the time a law school emerged at Bologna, the *Corpus iuris civilis* was adopted as a consistent code of law, although the glossators were well aware how it had come into being. They knew when the jurists mentioned in the Digest had lived and they knew when the emperors had reigned when mentioned in the Codex. Moreover, they had also a historical understanding of the *Corpus iuris*, in the sense that they realised that some provisions were outdated. Nevertheless, for them the *Corpus iuris* was as Justinian had intended it to be: a code of law, of which the provisions had equal validity and derived their meaning from the position within a specific title and from their coherence with other texts in that title and in corresponding titles in the other parts of the *Corpus iuris*. The *Corpus iuris* could boast a respectable age and the authority of the Christian emperor of the realm who had promulgated it as the common law of the Italian territories. Justinian's heritage would have laid the foundation of the medieval German empire (politische Romidee) and of medieval arts and sciences (kulturelle Romidee). Adopted by the Catholic Church as a subsidiary law, the *Corpus iuris* spread over Europe and, within the context of medieval Europe, it was no longer bound by time and borders, as the Roman law of Antiquity had been, either classical or Justinianic.

It was this awareness of the *Corpus iuris* which affected the European *ius commune*. As a matter of fact, the glossators through fertile misinterpreta-

⁷⁶) Some argued that the origin of development should indeed be sought in Roman antiquity, see e.g. the article of Baldus and Wacke, in which they parried in a subtle and adequate way the criticism of D. Simon & co. on the method of Zimmermann: C. Baldus/A. Wacke, Frankfurt locuta, Europa finita? Zur Reinen Rechtsgeschichtslehre in Band 12, 1993, des Rechtshistorischen Journals (RJ) und zu anderen Zweifeln am Gegenwartswert des Römischen Rechts, in: Zeitschrift für Neuere Rechtsgeschichte 17 (1995) 283–292, 286.

⁷⁷) This belief resulted i.a. from a number of discussions I had with my colleague Tammo Wallinga (Antwerp).

tions solved most or all inconsistencies between the provisions of Roman law, while the commentators further systematized the materials and formulated the general rules which apparently underlie the case-based decisions but were not yet phrased as such. Moreover, medieval jurists were keen to adjust the purport of the texts to the needs of their own time. However, this was all done on the basis of the texts as phrased by the compilers and promulgated by Justinian in the sixth century. It was this text and not any reconstruction of classical law on which medieval scholarship, including Bartolism and the *mos italicus*, focussed. It was this text which to some extent penetrated legal practice and was commented upon by practice-oriented early modern jurists, although at that stage of development the Corpus iuris had become one of many legal bodies, relevant for legal practice. In the theories of Natural Law, it was now used as confirmation, not as substantiation of legal doctrine. Legal humanism, which regarded the Corpus iuris as a source of information about ancient law and the society of ancient Rome, did not manage to overshadow the mainstream of practice-oriented jurists following in the footsteps of Bartolus. However, regarding the Corpus iuris as an ageless and universal source of law does not go back any further than the era of the glossators. Previous to the Bologna school of law there is a wide gap. For many centuries, the knowledge of Roman law slumbered in the West and major parts of the Corpus iuris fell into oblivion. The trail backwards into history comes to an end around 1100. No matter at which time and how precisely we draw the line, there is a rupture with Late Antiquity and Byzantium, when Roman law was still a 'living' law in the sense of subject to new imperial legislation.

Thus, history displays an unbridgeable gap in handling the Corpus iuris. In the civilian tradition the Corpus iuris was a code of law and this premise dominated legal thinking for many centuries. From the perspective of legal development through time towards contemporary law, it is impossible to exchange this premise for a fundamentally different one, viz. that the Corpus iuris is a source of knowledge of pre-Justinianic law. Regarding the Corpus iuris as a collection of texts, displaying the law of Antiquity, implies a fundamental change in interpretation. It means considering it an archaeological site of customary law and imperial jurisprudence and legislation that once existed. It means unravelling the Corpus iuris. The latter is possible but would be at complete right angles to the medieval understanding of it. Moreover, it would not be capable of establishing a historical and intellectual continuation between Late Antiquity and the eleventh century. What we would trace, following the humanist jurists, are no genetic-functional links in a development towards later times. The much praised 'classical Roman law' played no

role whatsoever in the legal thinking of the glossators and commentators. It had hardly any relevance for the *ius commune* but was the result of reconstructions which humanistic and neo-humanistic scholars produced many centuries later. Thus, whoever wishes to understand the civilian tradition and its contribution to contemporary law, is well-advised to ignore classical law for the simple reason that it can obscure our view. Whoever wishes to understand the *ius commune*, should abstain from reading Gaius' Institutes, discovered in 1816, for the simple reason that no jurist in the *ius commune* tradition has ever done so.

Finally, there is a didactical consideration, which Zwolve probably had in mind, for focussing on Justinianic law in legal education. The latter allows us to read the Digest texts in a less complicated way than adopting them as reflecting classical law. We can set aside any discussion of linguistics, interpolation criticism, palingogenesis, litigation of the classical period (formulary procedure), the relationship of remedies to the praetorian Edict, rhetoric elements in the reasoning, differences between Proculians and Sabinians, developments between early and later classical law, and the method and characteristics of the specific classical jurists under dispute. The same holds true for the wider philosophical, social, political and economic context.

(v) Avoiding anachronisms:

When going back in time, we also have to realise that there was not always a sharp distinction between public law and private law or between the three 'branches of power' as distinguished in later times. We should avoid reading the historic materials from our present-day perspective which is permeated by such distinctions, just as the sharp distinction into the subfields of private law, as we know these from our Codes.

When teaching legal history and describing the legal sources, there is always the risk of ending up in structures determined by Natural law, Pandectism or the Civil Codes. This happened to even the neo-humanistic scholars, as their textbooks show. At the same time, the applicative approach requires comparison with present-day law. The most legitimate solution seems to be to use the Justinianic Institutes or historical commentaries on this text, which describe Roman law in its Justinianic, medieval or early modern shape⁷⁸⁾. The Institutes were meant to introduce students to the system and principles of the law. They can still serve this purpose. Reading the Institutes

⁷⁸⁾ It was my colleague Harry Dondorp who developed and promoted the idea of using the Justinianic Institutes and commentaries on these Institutes in present-day Roman law courses.

is based on a long-standing and continuous European tradition and avoids the danger of developing inaccurate conceptions due to the use of anachronistic distinctions or explaining Roman law by using anachronistic concepts.

In addition, there is nothing wrong with reading and interpreting case-based texts from the Digest as a didactical exercise, so long as we acknowledge the function these texts must have had in the development of law and legal thinking in continental Europe. They could, but should not, be used as indirect sources of information about the life and society of Ancient Rome during the first centuries of our era. They could, and should, be used to let students map out some basic elements of *ius commune*-doctrine and develop their skills in decontextualizing and resubstantializing legal texts from primary sources.

V. Epilogue: future education, new courses and new textbooks

It is surely advisable to continue compulsory courses in legal history, including attention to Roman law, preferably based on the premises just described, for at least two reasons⁷⁹). In the first place, such courses can provide students with invaluable insights. Legal history can show that law is always developing and that it is not a static but a dynamic phenomenon. Legal history will open future jurists' eyes to the fact that some problems are of all ages, whereas solutions can sometimes be culture-bound. Moreover, students will experience the strength of private law dogmatics, derived from Roman law and the *usus modernus*, and the courses will prevent students from being obsessed by the details of positive law, enabling them to put present-day law into perspective. A second reason why legal history is an indispensable part of legal education, consists in the fact that the present-day Code of Civil Law (Burgerlijk Wetboek) cannot be properly understood or applied without legal historical methods. The Code has already a history of its own and one of the aids for interpreting the Code is looking at the statutory history of its provisions, i.e. the legislative process of the Civil Code coming into being, which took place from the post-war-years until the beginning of this century. In civil litigation and doctrine, this statutory history is frequently referred to, but it cannot be properly understood without decontextualisation and resubstantialisation. This becomes all the more obvious when the societal and political

⁷⁹) It may also be appropriate, to speak no longer about courses in Roman law, but about, for example, a course 'principles of private law' or 'historical development of private law'.

context of the legislative process of the past is more remote or deviates more strongly from the present-day reality in which the various provisions of the Code have to function.

Drafting legal historical courses and textbooks on the basis of the premises mentioned, does not require superhuman efforts, but just a certain look at Roman law. Especially those trained in classical Roman law, will need time to adjust and to read Digest texts no longer from the neo-humanistic perspective i.e. as jurists' replies from the classical period, but from the perspective of the *ius commune*, i.e. as provisions from a code of law. During past decades I undertook, on two occasions, to write a textbook based on the principles described above. Both textbooks and their underlying principles were developed on the basis of the practical experience of teaching Roman law to undergraduate students and in close consultation with other lecturers teaching these courses⁸⁰). The first book was 'Fons et origo iuris', edited for the first time in 2006. It described primarily the law of obligations and the law of property, but unlike the textbooks of Feenstra and others, the focus was now entirely on the Corpus iuris civilis itself. Only occasionally was reference made to classical law. Moreover, for three topics, the book described the historical development towards present-day law and to some extent also the interaction with other legal traditions: transfer of ownership, delict (extra-contractual liability) and the open or closed system of contract⁸¹). The textbook was subsequently elaborated for use in Belgium by professor T. Wallinga of Antwerp University⁸²). The second book 'Lijf ende goedt' was specifically written for a law course of seven weeks. It pays more attention to external legal history, while the second part of the book focuses more strongly upon legal development and the reciprocity between the various legal traditions in continental Europe. This second part deals exclusively with extra-contractual liability. The emphasis is on primary sources so as to avoid anachronisms and the use of nineteenth century concepts. Students learn the Roman law of delicts by reading the first titles of Book IV (Inst. 4,1–5) of the Justinian Institutes (in Dutch translation). They also read (in Dutch translation) a medieval *Summa*, commenting on the same titles, viz. the early twelfth century *summa 'Iustiniani est in hoc opere'*. This enables them to

⁸⁰) I would like to mention here specifically Harry Dondorp, Viola Heutger and Hylkje de Jong.

⁸¹) J. Hallebeek, *Fons et origo iuris*, Een historische inleiding tot het vermogensrecht, Amsterdam ³2008.

⁸²) J. Hallebeek/T. Wallinga, *Fons et origo iuris*, Versio Belgica, Een historische inleiding tot het vermogensrecht, Amsterdam ³2015.

discover how the Roman law of delicts came to life in the Middle Ages. The Roman-Dutch law of delict is explained through the commentary of Arnold Vinnius (1588–1657), again on the same titles. Other traditions, relevant for interpreting Roman law texts and the development of extra-contractual liability, such as canon law, indigenous law, early modern scholasticism and Natural Law, are fully integrated in the book, while the final chapters deal with extra-contractual liability in the major continental codes of civil law, present-day developments and some comparison⁸³).

Legal education in the Netherlands has changed dramatically over the past thirty years and it is difficult to say when these developments will reach a conclusion. Educational policy, teaching methods and law schools' compulsory curricular programmes are subject to continual debate and ongoing reforms. It is difficult to say what this will eventually mean for the teaching of Roman law and legal history. For the time being, we can only continue to search for the most appropriate teaching methods in these changing circumstances and do our utmost to ensure we address the changing demands⁸⁴).

⁸³) J. Hallebeek (with the collaboration of J.H. Dondorp and H. de Jong), *Lijf ende godet, De juridische bescherming van de menselijke persoon en diens vermogen, Een schets van de continentale rechtsgeschiedenis*, Amsterdam ³2017.

⁸⁴) This contribution is an elaborated version of a paper delivered on 18 September 2015 at the MEF University Istanbul on the occasion of the 69th session of the Société Internationale Fernand De Visscher pour l'Histoire des Droits de l'Antiquité, dealing with the theme "Legal education in Antiquity and law of Antiquity in today's legal curricula". I would like to thank Boudewijn Sirks (The Hague) for his advice and help and Frances Gilligan (Amsterdam) for correcting the English.